Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Competitive Telecommunication Association, Florida Competitive Carriers Association, and Southeastern Competitive Carriers Association	
Petition On Defining Certain Incumbent LEC Affiliates As Successors, Assigns, or Comparable Carriers Under Section 251(h) of the Communications Act	CC Docket No. 98-39

COMMENTS OF THE

UNITED STATES TELEPHONE ASSOCIATION

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SUMMARY

The Commission should promptly deny the petition, filed by three trade associations that represent CLECs, seeking to extend burdensome "incumbent carrier" regulation to certain affiliates of incumbent LECs. The proposals in the petition are anticompetitive attempts to handicap incumbent LECs and their affiliates by preventing them from efficiently structuring their operations to serve the public.

The petition's request to establish a presumption regarding treatment of an affiliate as a "successor or assign" of an incumbent LEC under section 251(h)(1) of the Act is legally unsound as well as anticompetitive. Nor should the Commission initiate the proposed rulemaking regarding the "comparable carrier" provision of section 251(h)(2).

The actions requested in the petition are contrary to the Communications Act's procompetitive and deregulatory intent, and particularly the Commission's ongoing biennial review of its regulations under section 11 of the Act.

Any issues raised by specific carriers' status under section 251(h) should be addressed on a case-by-case basis. Doing so will avoid the harmful effects of the inflexible and overbroad regulations proposed in the petition.

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I. INTRODUCTION

The United States Telephone Association ("USTA") hereby opposes the petition for declaratory ruling or, in the alternative, rulemaking in the above-captioned proceeding.[1/] USTA urges the Commission promptly to deny the petition, which was filed by three trade associations that represent CLECs. The petition's request for a sweeping declaration,

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1/ *See* Petition For Declaratory Ruling Or, In The Alternative, For Rulemaking of the Competitive Telecommunications Association, *et al.* (filed Mar. 23, 1998) (the "petition").

nominally addressing the "successor or assign" portion of section 251(h)(1) of the Act,[2/] is actually an anticompetitive attempt to prevent incumbent LECs and their affiliates from efficiently structuring their operations to serve the public.[3/] Nor should the Commission initiate a rulemaking to explicate the "comparable carriers" provision of section 251(h)(2) of the Act.[4/] Instead, any issues raised by specific carriers' status under section 251(h) should be addressed on a case-by-case basis. Doing so will avoid the harmful effects of the inflexible and broad regulatory interventions proposed in the petition.

USTA, as the trade association of the incumbent LECs, is deeply concerned that the proposals in the petition seek to handicap incumbent LECs and their affiliates. The requested actions are contrary to the Act's procompetitive and deregulatory intent, and particularly the Commission's ongoing biennial review of its regulations under section 11 of the Act.

II. THE PETITION'S PROPOSALS ARE DESIGNED TO LIMIT COMPETITION, CONTRARY TO THE ACT AND PRECEDENT

A. The Presumption Proposed In The Petition Is Anticompetitive And Legally Unsound

Petitioners seek to hamstring incumbent LECs and their affiliates competitively by proposing broad rules that would limit these carriers from arranging their business operations

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[2/] *See* section 251(h)(1)(B)(ii) of the Communications Act of 1934, as amended (the "Communications Act" or the "Act"), 47 U.S.C. § 251(h)(1)(B)(ii).

[3/] Indeed, as it applies to the BOCs, the petition should be dismissed as an untimely request for reconsideration of the Commission's decisions regarding section 251(h) in *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905, 22055 (1996) (the "Non-Accounting Safeguards Order").

[4/] *See* 47 U.S.C. § 251(h)(2).

efficiently for competition in the telecommunications marketplace. The petition requests the Commission to adopt a rebuttable presumption that an affiliate is a "successor or assign" of an incumbent LEC -- and thus is subject to regulation as an incumbent LEC under section 251(h)(1) -- if the affiliate uses corporate or brand names that are "the same or similar" to those of the incumbent LEC when the affiliate provides wireline service in the incumbent LEC's local service territory.[5/]

By seeking presumptively to restrict such an affiliate's use of the "same or similar" corporate brand names, the petition's intent is apparent: to limit the competition that CLECs could face from such affiliates.[6/] The Commission has already ruled that:

> [A] BOC affiliate should not be deemed an incumbent LEC subject to the requirements of section 251(c) solely because it offers local exchange service; rather, section 251(c) applies only to entities that meet the definition of an incumbent LEC under section 251(h).[7/]

Apparently in response to this holding, the petition improperly seeks to impose "incumbent LEC" regulation on some affiliates by seeking to manufacture "successor or assign" status based on the brand names that they use and where they offer local service.[8/]

[5/] *See* petition at 1, 2, 11-12, n. 25. The petition also requests that such affiliates be regulated as dominant carriers. *See id.* at 12-13.

[6/] Although the petitioners make a variety of allegations about one LEC's in-region affiliate, they have not demonstrated that this affiliate has acted in any way contrary to the Act. The Commission should not impose substantial burdens on all in-region affiliates on the basis of these unsubstantiated allegations.

[7/] Non-Accounting Safeguards Order, 11 FCC Rcd at 22055.

[8/] *See* petition at 11-12. In light of the Commission's holding on this issue in the Non-Accounting Safeguards Order, which specifically addressed BOC affiliates, the petition is an untimely petition for reconsideration of that order, and should be dismissed as procedurally

(continued...)

The petition's attempt to base an affiliate's status as a "successor or assign" on such inflexible factors as the use of certain brand names or the location of the affiliate's activities would impose regulation far too broadly, consistent with petitioners' efforts to block competition from these affiliates. The petition claims wrongly that an affiliate that uses the same resources as an incumbent LEC in providing local service to "certain" customers in the LEC's service area "essentially has replaced or 'succeeded'" the incumbent LEC.[9/] This clearly is not so. Most basically, the incumbent LEC will, by definition, still exist in its service area, and still will be subject to the obligations of incumbent LECs established by the Act.

More generally, many types of business relationships that could increase efficiency and improve customer service are permissible between incumbent LECs and their affiliates. The onerous presumption proposed in the petition would effectively limit the types of appropriate affiliate relationships that could evolve, and inevitably would prevent such potential efficiencies from being realized. This would provide a major, regulation-based competitive advantage to CLECs, many of which are themselves affiliated with large businesses.

Contrary to petitioners' claims, the "plain meaning" of section 251(h)(1) does not mandate the requested declaratory ruling. That section does not independently define "successor or assign." It certainly does not address how any affiliate can be considered a

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[8/](...continued)
improper regarding the BOCs. *See* 47 C.F.R. § 1.429(d) (stating that petitions for reconsideration must be filed within 30 days of the date of public notice of Commission action in a rulemaking).

[9/] Petition at 9.

"successor or assign" of an incumbent LEC, particularly while the incumbent LEC continues in existence.

The petition loosely and unsuccessfully attempts to reconcile its burdensome regulatory proposals regarding the meaning of "successor or assign" with other areas of law. In doing so, the petition ignores the fact that under the general corporate law of successorship, the presumption is that even if a corporation transfers all of its assets, the transferee is not liable as a "successor" for the obligations or debts of the transferor.[10/] By analogy, an affiliate should be presumed not to be a "successor or assign" for purposes of incurring the broad regulatory obligations already imposed on the incumbent LEC.[11/]

Under corporate law, a transferee succeeds to the debts of a transferor only under several narrow exceptions to the general rule of non-liability. Of most interest with respect to the petition, a transferee may be held liable as a successor if it is "a mere continuation of the selling [or transferring] corporation."[12/] But this continuation exception has been held

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10/ *See, e.g., Bud Antle, Inc. v. Eastern Foods, Inc.*, 758 F.2d 1451, 1456 (11th Cir. 1985) ("*Eastern Foods*"); *Travis v. Harris Corp.*, 565 F.2d 443, 446 (7th Cir. 1977) ("*Travis*").

11/ As discussed in section II.D below, the Commission should rely on case-by-case analysis if an issue arises in a specific instance regarding the applicability of section 251(h).

12/ *See Eastern Foods*, 758 F.2d at 1456-57; *Travis*, 565 F.2d at 446; *Ladjevardian v. Laidlaw-Coggeshall, Inc.*, 431 F.Supp. 834, 839 (S.D.N.Y. 1977) ("*Ladjevardian*"). The other commonly recognized exceptions to the non-liability rule are (i) if the buying corporation expressly or impliedly agrees to assume debts of a predecessor; (ii) the transaction amounts to a *de facto* merger of the buyer and seller, or (iii) the transaction is entered into fraudulently in order to escape such debts. *See Eastern Foods*, 758 F.2d at 1456.

to require a common identity of directors, stockholders, and the existence of only one corporation at the completion of the transfer.[13/] As U.S. courts of appeal have recognized:

> In determining whether one corporation is a continuation of another, the test is whether there is a continuation of the corporate entity of the seller -- not whether there is a continuation of the seller's business operation.[14/]

As a result, the "continuation exception" of successorship, which seems to be the basis of the petition's reasoning, is generally not even triggered when the transferring corporation remains intact, and its application is questionable when the transferee has not transferred substantially all of its assets. This is the case for the affiliate relationships at issue in the petition, where both the incumbent LECs and their affiliates would have continuing and well-defined separate identities.

State regulators have analyzed relationships between incumbent LECs and their affiliates within their service territories using this corporate law approach. USTA believes that the Commission should do so, as well. In approving with modifications a plan of the Southern New England Telecommunications Corporation ("SNET") to reorganize its business units to include a "retail" affiliate in its service territory, the Connecticut Department of Public Utility Control applied the state's corporate law in finding that such an affiliate of an incumbent LEC is not a successor for purposes of section 251(h)(1) of the Act:

> In Connecticut, a successor has always been interpreted to constitute another corporation which, by a process of amalgamation, consolidation, or duly authorized legal succession, has become invested with the rights and assumed the burdens of the first corporation. To be a successor, the succeeding

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13/ *See Ladjevardian*, 431 F. Supp. at 839; *Kloberdanz v. Joy*, 288 F. Supp. 817, 820 (D. Colo. 1968).

14/ *See Eastern Foods*, 758 F.2d at 1458, *citing Travis*, 565 F.2d at 447.

> corporation should, in all material aspects, "stand in the boots of the old one." *D.D.J. Electrical Contractors, Inc. v. Nanfito & Sons Builders, Inc.*, 40 Conn. Sup. 50, 52 [479 A.2d 1250] (1984). The Department, therefore, concludes that SNET's proposal, which entails assumption of retail activities by [an affiliate], does not place [the affiliate] in the stead of the Telco in all material respects.[15/]

In seeking to justify its broad reading of "successor or assigns," the petition wrongly relies on federal labor law, which addresses the issue of successorship in determining the conditions under which a new employer "succeeds" to the business of another for the purpose of being obligated to bargain with the union representing the predecessor's employees.[16/] However, the Supreme Court itself has distinguished the labor law doctrine of successorship from the successorship doctrines of general corporation law,[17/] such as those followed by the Connecticut Department of Public Utility Control.

The labor law cases cited in the petition do not support the types of *ex ante* presumptions or rules that the petition proposes. In the labor law context, the Supreme Court has consistently held that determining whether a new company is the successor of the old is "primarily factual in nature and is based upon the totality of the circumstances in a

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15/ *See DPUC Investigation of the Southern New England Telephone Company Affiliate Matters Associated with the Implementation of Public Act 94-83*, Docket No. 94-10-05 (Conn. Dept. Pub. Util. Con. June 25, 1997) 45-49.

16/ *See, e.g., Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 29-30 (1987) ("*Fall River*"); *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249, 250 (1974) ("*Howard Johnson*").

17/ *See Golden State Bottling Co., Inc. v. NLRB*, 414 U.S. 168, 182 n.5 (1973); *Howard Johnson*, 417 U.S. at 264, n. 9:

> There is, and can be, no single definition of "successor" which is applicable in every legal context. A new employer, in other words, may be a successor for some purposes and not for others.

given situation."[18] This is opposite to the petition's approach, which would establish a presumption of "successorship" if certain conditions are met. Moreover, the cited labor cases consider situations in which a company sells out to, or is transformed into, another. They do not address the types of affiliate relationships that are the subject of the petition.[19]

B. The Commission Should Not Initiate The Proposed Rulemaking

Perhaps recognizing the weakness of its proposals regarding affiliates as "successors or assigns" of incumbent LECs, the petition requests in the alternative that the Commission initiate a proceeding to adopt a rule "clarifying the criteria" under which carriers affiliated with incumbent LECs will be considered "comparable" carriers under section 251(h)(2) of the Act.[20] The Commission should reject this proposal as well. The proposed criteria are identical to those that the petition requests with respect to "successor and assign" status,[21]

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[18] *Fall River*, 482 U.S. at 43.

[19] Assuming *arguendo* that the labor cases had some applicability to section 251(h)(1), the Court's decision in *Howard Johnson* cuts against the petition's fixation with affiliates' use of brand names of the incumbent LEC.

In *Howard Johnson*, Howard Johnson Co. had purchased a motel and restaurant from one of its franchisees, which operated them under the "Howard Johnson's" brand name. After analyzing the facts of the transaction in detail, the Supreme Court declined to require Howard Johnson Co. to arbitrate with a union under a collective-bargaining agreement previously entered by the franchisee. The fact that the Howard Johnson brand name was used by both the selling franchisee and the buyer did not trigger a duty for the buyer to arbitrate. *See* 417 U.S. at 264-265.

[20] *See* petition at 13-14.

[21] The petition proposes that an affiliate be treated as a "comparable carrier" if (i) the affiliate provides local service in the incumbent LEC's service area, and (ii) the incumbent LEC has transferred anything of value, including brand names, to the affiliate. *Id.* at 13.

and they are subject to the same fundamental policy flaws of being anticompetitive, inflexible, and overbroad. The Commission should therefore deny the petition's request for rulemaking to the negative policy effects.

C. The Petition Is Contrary To The Intent Of The Act

As a general matter, the petition's proposals are contrary to the Act's procompetitive, deregulatory intent. The adoption of a broad presumption or rule that effectively imposes "incumbent LEC" status on a wide variety of affiliates is inconsistent with the regulatory review that must be conducted in 1998 pursuant to section 11 of the Act. That section mandates that the Commission:

> (1) shall review all regulations under this Act in effect at the time of the review that apply to the operations or activities of any provider of telecommunications service; and
>
> (2) shall determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service.[22/]

In light of the anticompetitive effect and overbreadth of the proposed rules, it would be worse than ironic for the Commission to adopt them in the midst of its biennial regulatory review. Prompt denial of the petition would best serve the intent of the Act generally and section 11 in particular.

22/ *See* 47 U.S.C. § 161.

D. Section 251(h) Issues Should Be Addressed On A Case-By-Case Basis

Rather than adopting the inflexible and anticompetitive regulations proposed in the petition, the Commission should address issues under section 251(h) on an individualized, fact-specific basis. As noted above, the "successor or assign" standard of section 251(h)(1) depends on such a fact-specific evaluation. Of course, the petition proposes a burdensome "rebuttable presumption" regarding whether an affiliate is a "successor or assign" of an incumbent LEC under section 251(h)(1).[23/] This presumption could be construed as permitting a case-by-case determination, but with the burden on an affiliate to show that it is not a "successor or assign." There is no public policy reason for such a presumption.

Similarly, the "comparable carrier" provision of section 251(h)(2) should be invoked only after a careful and even-handed analysis of the similarities and differences among carriers. The anticompetitive standards proposed in the petition should not be the basis for such an analysis. Rather, the Commission should directly apply the specific factors of section 251(h)(2)(A)-(C) in determining whether "incumbent LEC" regulation should be imposed on a LEC affiliate.

[23/] Petition at n. 25.

III. CONCLUSION

USTA urges the Commission to deny the petition promptly. Doing so will avoid the anticompetitive consequences of the declaration or, alternatively, rulemaking that the petition seeks.

Respectfully submitted,

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